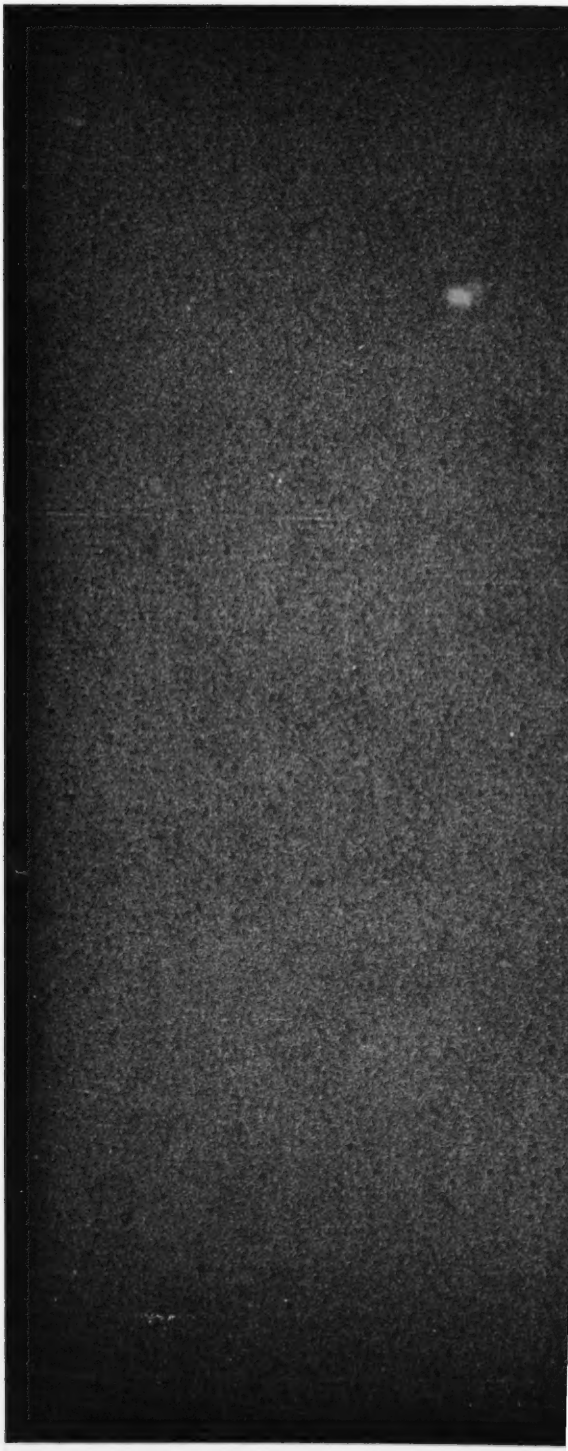

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1284

MICHAEL N. MERVIN, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSIO IN OPPOSITION

1. Petitioner, a Schedule A non-veteran attorney i the excepted service, challenges his discharge fro employment by the Federal Trade Commission.

By letter of December 31, 1970, the Commissio Executive Director advised petitioner that his servic would be terminated on January 29, 1971. The lett stated as the basis for the decision that th "Commission's financial situation requires a reductio in our payroll * * *."[1] Subsequently, in response t an inquiry by petitioner's Congressman, the Executiv Director stated:

[1]This letter was filed in the district court as Exhibit A to th affidavit of John A. Delaney, Assistant Executive Director of th Federal Trade Commission.

> The Federal Trade Commission's appropriation request for the current fiscal year was cut by the Congress to the extent that it was necessary for this Commission to reduce force. Rather than conduct a formal reduction in force every effort has been made to separate employees whose services can be spared. Mr. Mervin's supervisors have advised me that his services could be spared without detriment to the functional area to which he is assigned. His separation is being effected as an administrative action pursuant to the Chairman's authority to terminate appointments of non-veteran employees in the excepted service. If a formal reduction in force had been instituted Mr. Mervin would have been one of the first affected.[2]

After the termination of his employment, petitioner brought this action in the United States District Court for the District of Columbia, contending, *inter alia,* that his discharge was arbitrary, capricious, and in violation of due process.[3] After the government had answered and moved for summary judgment, petitioner filed a motion for summary judgment and a supporting memorandum in which he claimed for the first time that the Federal Trade Commission had violated the governing statute (5 U.S.C. 3501) and the Civil Service Commission

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[2]Exhibit B to the Delaney affidavit, *supra,* note 1.

[3]Petitioner's complaint also claimed that a sealed envelope in his personnel file marked "confidential" had been wrongfully withheld from him. However, that envelope was later made available to petitioner and is no longer in issue in this case.

regulations (5 C.F.R. Part 351) applicable to a reduction-in-force. In response to that contention, the government contended that, in addition to other grounds for dismissal, the case should also be dismissed because petitioner had failed to exhaust the administrative remedy available to an employee who claims that his discharge is based on a reduction-in-force.[4]

The district court dismissed petitioner's complaint, without prejudice, on the ground that petitioner had not exhausted his administrative remedies (Pet. App. B). The court of appeals affirmed (Pet. App. A).

2. The decision of the court of appeals is correct, and there is no reason for further review.

a. Petitioner contends (Pet. 6-9) that he was not required to exhaust reduction-in-force procedures, because his discharge was not effected pursuant to a reduction-in-force. Although he has now retreated from the position he took in the district petitioner there claimed that the reduction-in-force regulations should have been but were not applied in his case. Since he had not invoked the administrative remedy available to an employee who makes such a claim, the district court correctly dismissed the complaint without prejudice. See, *e.g.*, *McKart* v. *United States*, 395 U.S. 185, 193-195; *Beard* v. *Stahr*, 370 U.S. 41. Cf. *Christian* v. *New York State Department of Labor*, No. 72-5704, decided January 21, 1974; *DuBois Clubs* v. *Clark*, 389 U.S. 309.

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[4]Under the applicable Civil Service Commission regulation, 5 C.F.R. 351.901(a), any employee discharged as part of a reduction-in-force "who has received a notice of specific action and who believes this part [the applicable reduction-in-force regulations] has not been correctly applied may appeal to the Commission * * *."

b. Petitioner contends alternatively (Pet. 10-11) that the remedy available to an employee who has been discharged as part of a reduction-in-force (an appeal to the Civil Service Commission under 5 C.F.R. 351. 901(a)) does not satisfy the requirements of due process, because it does not provide for a hearing before separation. He concludes that he was not required to exhaust a constitutionally inadequate remedy. But, as this Court held in *Christian* v. *New York State Department of Labor, supra,* slip op. at 8, the failure to invoke available procedures is a bar to the consideration of an attack upon their constitutional validity.

In any event, due process does not require a prior hearing in connection with a reduction-in-force. Cf. *Arnett* v. *Kennedy,* No. 73-1118, decided April 16, 1974.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.